In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1382

DOUGLAS MACLEOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals affirming the judgment of conviction (Pet. App. A–1–A–5) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A–6) was entered on January 25, 1971, and the petition for a writ of certiorari was filed on February 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

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2. Whether the trial court erred in permitting the government to introduce evidence of specific items of income in view of petitioner's willingness to stipulate that he had sufficient income to require the filing of income tax returns.

3. Whether the trial court properly excluded evidence of petitioner's political background at a pretrial hearing.

4. Whether the special agent should have given petitioner full *Miranda* warnings of his constitutional rights even though he was not in custody or otherwise deprived of his freedom of action.

5. Whether the trial court erred in charging the jury on the element of willfulness.

STATUTE INVOLVED

Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203, provides:

> 7203. *Willful failure to file return, supply information, or pay tax.*—Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on three counts of willfully failing to file income tax returns for the years 1963, 1964 and 1965, in violation of 26 U.S.C. 7203. On Count I (1963) he was fined $10,000 and sentenced to one year in prison; on Counts II and III (1964 and 1965) he was sentenced to five years' probation (App. 3–5, 13, 67).

The government's proof showed that, while income tax returns were required of all persons with gross income in excess of $600 during these years, petitioner (a practicing lawyer) had filed no returns (App. 17) even though his income was as follows (App. 18):

Year	Gross receipts	Net income
1963	$34,183.22	$29,728.69
1964	39,962.50	10,826.51
1965	19,200.90	13,157.11

Petitioner advised the Treasury agents that he had three reasons for not filing his tax returns, namely, procrastination, a sloppy way of doing business, and personal problems (App. 22). Petitioner explained that his personal problems related to his heavy drinking (App. 23); that there were periods in which he was not lucid for a week or more, and that some of his cases had to be postponed because he was unable to appear in court at the scheduled times (App. 23). Petitioner had filed returns for many years preceding 1963 (Tr. 156–159).

ARGUMENT

1. Petitioner argues, in effect, that the evidence of willfulness in this case is not as strong as that in some other failure-to-file cases (Pet. 18–21) and that the jury should have accepted his contention that his failure was not willful but, instead, that it resulted from "sloppiness, personal problems [drinking] and procrastination" (Pet. 20). Willfulness is rarely provable by direct evidence, and may be inferred by the finder of fact in a proper case. Here the jury was entitled to consider that during the years in question petitioner realized very substantial net, as well as gross, income from his law practice (*supra*, p. 3); that after the investigation began petitioner sat down with his accountant and in only two or three days they had reconstructed his income and expenses for the three years (Tr. 32, 37, 41, 43, 49, 61, 140, 145); that petitioner's desk was fairly orderly with papers stacked neatly (Tr. 50); that petitioner kept track of his appointments and had someone else cover them if he was unable to do so (Tr. 130); that on a number of matters which petitioner handled during the years in question he was able to perform, and did perform, all the functions of a lawyer (Tr. 162–167, 193); and that for many years prior to 1963 petitioner, with the same bookkeeping system, did file income tax returns (Tr. 156–159). Thus, there was ample evidence to sustain the conclusion of both courts below that petitioner's failure to file returns for the years 1963 through 1965 was willful.

2. The trial court properly admitted proof of specific items of income despite petitioner's willingness to concede that he had received substantial gross income in each of the years. This evidence was pertinent to the issue of willfulness as tending to show that petitioner's alleged sloppiness and drinking problem did not prevent his earning large sums from his practice of law during the three years. *Lumetta* v. *United States*, 362 F. 2d 644, 645-646 (C.A. 8).

3. Petitioner urges (Pet. 31–33) that the trial court erred, in the course of a pre-trial hearing, in excluding evidence bearing upon petitioner's "political background" which might have shown that the prosecution was politically motivated. Petitioner's political background, however, was wholly irrelevant to any issue before the court. Furthermore, there was no offer of proof as to what petitioner intended to show and the contention is so vague that petitioner even now provides no clue as to what his "political background" is and how that might have influenced his prosecution.[1]

4. Petitioner argues (Pet. 33–36) that the special agent of the Internal Revenue Service was required to give petitioner the full warnings of his constitutional rights set forth in *Miranda* v. *Arizona*, 384 U.S. 436. But since petitioner was not in custody nor otherwise deprived of his freedom in any significant way, the requirements of *Miranda* did not apply. This is

[1] This is one of the several issues disposed of by the court below with the comment that they were "frivolous (Pet. A–3, A–5).

in accordance with the rule in the Eighth Circuit, *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943, and in eight other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417–420 (C.A. 3); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

Petitioner asserts, as have the petitioners in a number of other cases in which this Court has denied certiorari, a conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). In *Dickerson*, the Seventh Circuit held that a taxpayer must be given *Miranda* warnings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (p. 1117). But this rule was made applicable only to "interrogations taking place after the date of this decision," July 28, 1969 (p. 1117), long after the evidence in petitioner's case was turned over to the agents. Moreover, it is the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first inter-

viewed by a special agent.[2] Thus, there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See, *e.g.*, *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909.

5. There is no substance in the contention (Pet. 36–46) that the trial court erred in instructing the jury on the question of willfulness and in refusing certain requested instructions on the same subject. The court charged the jury as follows (App. 8):

> The word "willful" as used in the statute involved in this case means voluntary, purposeful, deliberate, and with the specific intent to do that which the law forbids as distinguished from accidental, inadvertent or negligent. The requirement that failure to make and file the returns in question be done willfully exists so that the accused will not be convicted of failing to make or file such returns because of mistake or inadvertence. If the jury believes that the defendant acted with negligence, inadvertence, mistake, or due to his good faith misunderstanding of the requirements of the law, his act was not willful.

[2] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

> On the other hand, if his act was done with bad purpose either to disobey or disregard the law then his act was willful. In this connection you are instructed that the only bad purpose or evil motive which the Government must prove in this case is the deliberate intention not to file a return which the defendant knew the law required him to file so that the Government would not know the extent of his liability.

This instruction has been approved by every circuit which has ever been asked to pass upon its propriety. *United States* v. *Cirillo,* 251 F. 2d 638 (C.A. 3), certiorari denied, 356 U.S. 949; *Haskell* v. *United States,* 241 F. 2d 790, 794 (C.A. 10), certiorari denied, 354 U.S. 921; *United States* v. *Gorman,* 393 F. 2d 209, 213 (C.A. 7), certiorari denied, 393 U.S. 832; *Ryan* v. *United States,* 314 F. 2d 306, 310, fn. 3 (C.A. 10); cf. *Spies* v. *United States,* 317 U.S. 492, 497–498.[3]

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[3] Petitioner makes the contention (Pet. 46–49) that the trial judge committed reversible error in denying him access to the presentence report. Although the court had the power, under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, to permit examination of the report, it is perfectly clear from the language of the rule and the decided cases that the matter is one of discretion in the trial court. *United States* v. *Crutcher,* 405 F. 2d 239, 245 (C.A. 2), certiorari denied, 394 U.S. 908; *Baker* v. *United States,* 388 F. 2d 931, 933 (C.A. 4); *Roeth* v. *United States,* 380 F. 2d 755, 757 (C.A. 5), certiorari denied, 390 U.S. 1015.

Equally insubstantial is the argument (Pet. 49–57) that Congress lacks the power, because of constitutional inhibitions, to proscribe criminally the willful failure to file an income tax return. *United States* v. *Sullivan,* 274 U.S. 259. (And see Pet. App. A–5)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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